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85-593

Supreme Court, U.S.
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

GEORGE & SOFIA PAPPANIKOLAOU, Petitioners, Pro Se,

v.

SECRETARY OF THE U.S. ARMY, Respondant

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

With respect to the Army Board of Correction of Military Records (BCMR); and the Office of the Surgeon General (OSG):

1.) Can the BCMR review a Veterans Administration (VA) decision, made under law 38 USC 211; which has since become permanent under law 38 CFR 3.951 after 20 years; and which states that the Plaintiff was 100% disabled as of his date of seperation from service, by service-connected conditions; and overturn it to decide that Plaintiff was 100% fit for Army duty on said seperation date; inorder to deny Plaintiff's request for a change of a Courtsmartial verdict, under the Privacy Act of 1974 and/or Article 69, Uniform Code of Military Justice (UCMJ), 10 USC 869; as the Courts decided; and if so, does this mean that now, said VA decisions are reviewable in Court?

2.) Can the BCMR use an identical OSG decision in place of their own decision, for the same purpose, as question 1., above?

3.) Were the Courts justified in deciding that BCMR decisions, with respect to a Veteran's request

for a change of military record, under the Privacy Act of 1974 and/or Article 69, UCMJ, 10 USC 869; are not reviewable in Court?

4.) Were the Courts justified in deciding that VA decisions made under law 38 USC 211, that have since become permanent under law 38 CFR 3.951; after 20 years; and which state that Plaintiff was 100% disabled as of his date of seperation from service, from service-connected conditions, because he had a sum total of 180% disability rating for being, Psychotic; having 2 incurable chronic pain conditions, Tension and Sinusitis Headaches; and bad left knee; a seperate decision awarding him a 10% disability rating for a Sinus condition; are not sufficient for a finding that Plaintiff was under a "legal disability" as mentioned in law 28 USC 2401?

5.) If the Army issues a seperation form DD-214 to the Plaintiff, showing he was "seperated from service " on June 9, 1956; 28 years later, for the first time, sends the Plaintiff a copy of his Honorable Discharge certificate showing he was "discharged from service" on May 31, 1962; in Federal District Court and Court of Appeals, states

that Plaintiff was "discharged from service" on his "seperation date of June 9, 1956"; instead of May 31, 1962, shown on Plaintiff's Honorable Discharge certificate, inorder to allege that Plaintiff's military records were destroyed in the Records Center fire of July 12, 1973, and to invoke the Statute of Limitations at the prior date; which both Federal Courts accepted as fact, over the Plaintiff's evidence and objection; then is the Plaintiff's "discharge from service" date now actually June 9, 1956, and if so, is the Army liable for all ramifications because of same?

6.) Were the Courts justified in deciding that a Veteran can sue the Army, based on a VA decision made under law 38 USC 211, which found Plaintiff to be 100% disabled as of Plaintiff's date of seperation from service; prior to said decision becomming permanent under law 38 CFR 3.951; without depriving the Army, or any other interested party, of their right to petition the VA to change said VA decision, including the Veteran himself?

7.) Were the Courts justified in deciding that a Veteran, who had been unable to obtain his

discharge certificate from the Army till 28 years after seperation from service, and 22 years after the fact; and thus did not know if he had been honorably discharged from the Army or not; since an honorable seperation does not in the least mean an honorable discharge; could have sued the Army, without having to prove that he was honorable discharged from same, and allowed to do so?

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14. Beller v. Middendorf, No. 75-2747GBH N.D. Calif. April 15, 1976 (unpublished); Pages 29, & 38.

15. Harmon v. Brucker, 355 U.S. 579 (1958); Pages 33, & 42.

16. Mathis v. United States, 391 F.2d 938 (Ct. Cl. 1968); Page 47.

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JURISDICTION OF THE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, George & Sofia Pappanikolaou, pro se, most respectfully pray that a Writ of Certiorari issue to review the judgement of the U.S. Court of Appeals for the Second Circuit entered on June 3, 1985, with a petition for a rehearing of same denied July 16, 1985; and a petition for an explination of the decision being ignored; docket no. 85-6036.

The jurisdiction of this court is invoked under law 28 USC 1254.

LAWS INVOLVED IN THIS CASE

Amendment V of the Constitution

No person shall....be deprived of life, liberty, or property, without due process of law.

5 USC 552 and 5 USC 552a; The Freedom of Information Act, and the Privacy Act of 1974, respectively.

NOTE: The folowing is quoted from the Union Calander No. 412, House Report No. 95-793, of the 95th Congress, 1st Session, entitled: A Citizen's guide on how to use the Freedom of Information Act and the Privacy Act in Requesting Government Documents; Thirteenth Report by the Committee on Government Operations.

Under "taking your case to Court", Page 28; "Under the Privacy Act, you can sue an agency for refusing to release your records, for denial of your appeal to amend a record, and for failure to act upon your appeal within the designated time. You can also sue if you are adversely affected by the agency's failure to comply with any of the provisions of the act."

"Judicial ruling favorable to you could result in the release or amendment of the records in

question. In addition, you can obtain money damages if it is proven that you have been adversely affected as a result of the agency's intentional and willful disregard of the act's provisions. You might also be awarded court costs and attorney's fees."

5 USC 552a(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt; and

(B) promply, either— (1) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or (11) inform the individual of its refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to

request a review of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement of facts setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

5 USC 552a(g)—(1) CIVIL REMEDIES.—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,--the individual may bring a civil action against the agency, and the District Courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)—

(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)—

(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and

order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth on subsection (k) of this section, and the burden is on the agency to sustain its actions.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive

less than the sum of $1,000; and

(B) the costs of this section together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where any agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action of any injury sustained as the result of a disclosure of a record prior to the to the effective date of this section.

THE FIRE AT THE NATIONAL PERSONNEL RECORDS CENTER

AT 9700Page Blvd., St. Louis, Mo. 63162; of July 12, 1973. From the American Civil Liberties Union Handbook; the Rights of Veterans; 1978; Page 52: "On July 12th, 1973, there was a fire at the Records Center that damaged or destroyed the following catagories of records:

1. Army personnel discharged between Nov.1, 1912, and Dec. 31, 1959: 2.5 million of 20 million can be salvaged.

2. Air Force personnel discharged between Sept. 25, 1947, and Dec. 31, 1963, last names beginning with the letters "I" through "Z"; 423,000 of 1.4 million can be salvaged.

3. Army personnel discharged between Jan. 1, 1973, and time of fire; 314,000 Of 316,000 can be salvaged."

NOTE: Plaintiff was discharged from the Army on May 31, 1962, as shown by his Honorable discharge certificate, sent to him, on Nov. 14, 1984, and was not listed as destroyed in said fire.

MANUAL FOR COURTSMARTIAL (MCM) 1951, U.S. Dept. of Defense, U.S. Printing Office. Page 26 of Chapt. VI

26-B; "Offenses arising out of one transaction."

"If a person willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is given by the same or other superior officer, a multiplication of charges of disobedience should be avoided. (169b)"

ARTICLE 25 "When it is intended to prefer charges, they should be preferred without any delay. An accumulation of saving up of charges through improper motives is prohibited."

ARTICLE 143 BEST EVIDENCE. "(1) General Rule. A writing is the best evidence of its own contents."

TM 8-240 PSYCHIATRY IN MILITARY LAW, By order of the Secretary of the Army, 1951; U.S. Government Printing Office, Wash. D.C.

Sect. II, Par. 5; "Irrestible Impulse (The "adhere to the right" Doctrine)". a."If the accused knows that the act is wrong, yet cannot "adhere to the right" because of some mental disorder, he is not mentally responsible."..."In general, only two kinds of mental illness can be considered—compulsive psychoneuroses and psychosis."..."In consequence, for practical purposes, true

irrestible impulse, or "inability to adhere to the right" occurs only in psychotics."

Sect. IV, Par. 24, Part G; LIMITATIONS ON EXPERT'S TESTIMONY—Legal Conclusions "An expert medical witness is not qualified to express an opinion on questions of law."

28 USC 2401 Time for commencing against the U.S.

(a) Every civil action commenced against the U.S. shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time of the claim accrues may be commenced within three years after the disability ceases.

38 CFR 3.1(k) Definitions."Service-connected" means, with respect to disability or death, that such disability was incurred or aggrevated, or that the death resulted from a disability incurred or aggrevated, in line of duty in the active military, naval, or air service."

38 CFR 3.951 Preservation of Disability Ratings.

"A disability which has been continuously rated at or above any evaluation of disability for

20 or more years for compensation purposes under laws administered by the Veterans Administration will not be reduced to less than such evaluation except upon a showing that such rating was based on fraud. Likewise, a rating of total disability for pension purposes which has been in force for 20 or more years will not be reduced except upon a showing that the rating was based on fraud. The 20-year period will be computed from the effective date of the evaluation to the effective date of reduction of evaluation. (38 USC 110; Pub. L. 91-32)(34 FR 11970, July 16, 1969)

38 USC 211. Decisions by Administrator; opinions of Attorney General.

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for Veterans and their dependants or survivors shall be final and conclusive and no other official or any court of the United States shall have power

or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise, (Amended P.L. 89-214, 1(b); 89-358, 4(h); P.L. 91-376, 8(a).)

(b) The Administrator may require the opinion of the Attorney General on any question of law arising in the administration of the Veterans' administration.

STATEMENT OF THE CASE

Plaintiff was drafted into the Army on June 9, 1954 at the age of 18; seperated June 9, 1956, at the age of 20; and on November 14, 1984, 22 years after the fact, received his "Honorable Discharge" dated May 31, 1962 in the mail, from the Army. As shown by 3 letters to Plaintiff, from the VA, dated May 28, June 2, and June 12, 1958, in the record, Plaintiff was awarded a total disability rating of 180% for service-connected conditions including: Psychosis; 2 incurable pain conditions, Tension and Sinusitis Headaches; and a bad left knee; and was considered totally disabled (100%), because of same, effective his seperation date of June 9, 1956.

While in service, Plaintiff was by Special Courtsmartial , on January 13, 1956, at Ft. Huachuca, Arizona, charged with the following specifications:

Spec. (1)(2)(3): In that Pvt-2 George Pappanikolaou, U.S. Army, 526th Signal Company (RRUHF), having received a lawful command from first Lieutenant

(George Degles)
(Wilson F. Smith), his superior officer, to wear
(George Degles)

his fatigue hat while in uniform, did at Fort

(17 December, 1955)
Huachuca, Arizona, on or about (3 January, 1956)
(3 January, 1956)

willfully disobey the same.

It is most respectfully submitted that the above 3 specs are an illegal "Multiplicity of Charges", in violation of Manual for Courtsmartial, 1951, Page 26, Chapter VI 26-B; "Offenses arising out of one transaction. If a person willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is given by the same or other superior officer, a multiplication of charges shall be avoided."

Since spec 1 has the earliest date, it is the only legal charge. Plaintiff was originally found guilty of specs 1 and 2, but later, spec 1 was dismissed by the Army Review Board for lack of evidence. It is most respectfully submitted that since Plaintiff was found not guilty of the only legal charge, then he is not guilty of all charges. Regardless, as shown by the record of Lt. Smith's

testimony, the accuser of spec 2; under the final re-cross-examination; Lt. Smith testified under oath "I did not tell him as a direct order." Since a serviceman can only be found guilty of disobeying a direct order, it is most respectfully submitted that Plaintiff is not guilty of spec 2, also.

As the courtsmartial record shows, Plaintiff was (1) not allowed to call Army psychiatrists who treated him, as witnesses; (2) was not allowed access to "best evidence" of his military psychiatric records; (3) but was only allowed the use of a prosecution summary of the various Army psychiatric records, written by a psychiatric consultant; which an Army doctor,Col. Hornisher, who was not a qualified psychiatrist, "edited"; by leaving out part "a", and adding his own diagnosis, and stated it was done in "accordance with Manual for Courtsmartial, 1951; and TM 8-240.",(Psychiatry in Military Law).

Said summary mentions Plaintiff had been diagnosed as having (1) a chronic character neurosis and a hypochondriacal neurosis; (2) an incurable pain condition, Tension Headaches; (3) "excessive

and persistant" "obcessions and compulsions", which TM 8-240 states in paragraph 5, only "true psychotics" have, and that said psychotics cannot be held legally responsible for their acts; and (4) an unexplained "inability to wear a hat", etc. Please note that the "Tension" in "tension headaches" is muscle tension, not emotional tension.

Based on the above, Col. Hornisher, incredibly diagnosed Plaintiff as having a "schizoid personality disorder" which is not recognized by the Army or VA as being disabling or compensable, and always is a life-long condition that the serviceman always had prior to entering service.

A VA medical report dated Aug. 27, 1958, mentions an Army psychiatric evaluation entitled "neurosis, Nov. 1955", while a VA letter dated May 28, 1958, mentions another Army psychiatric evaluation entitled "Psychosis with Tension and Sinusitis Headaches".

A VA evaluation, dated 1/8/80, done by pain specialists, diagnosed the "inability to wear a hat", as "Trigeminal Cephalagia", an incurable pain condition related to the Tension and Sinusitis

Headache pain conditions diagnosed by the Army, whereby, the Trigemus nerve in the scalp becomes super-sensitive, and even slight pressure on it, such as by wearing a hat, can cause unconsciousness.

It is most respectfully submitted that a person who is diagnosed by the Army, and verified by a VA decision, to be psychotic, cannot be held mentally responsible for his alleged act of refusing to put on his hat, when ordered to, especially since he was under a medical disability, Trigeminal Cephalagia, which was unknown at the time, and could have caused Plaintiff to pass out and injure himself and/or others, if he was driving a truck, for example.

Finally, Col. Hornisher, gave his legal opinion in his summary; that Plaintiff should not be given a medical discharge, but should be given a dishonorable discharge under AR 615-368; in violation of TM 8-240, Page 31, part g. "Limitation on Expert's Testimony: An expert medical witness is not qualified to express an opinion on questions of law." It is most respectfully submitted that Col. Hornisher, who was not even a qualified psychiatrist, by giving said opinion,

prejudiced the Court against the Plaintiff, when it was read into the record, and quoted by prosecution witnesses who had prior access to same.

Two months after seperation from service, as shown by the evidence of record, the VA examined the Plaintiff, and found, effective June 9, 1956; Plaintiff's seperation date; that he had a combined total disability rating of 180% for (1) Psychosis; (2) Tension Headaches; (3) Sinusitis Headaches; (4) left knee; plus (5) a seperate 10% rating for a Sinus condition; with service-connected conditions of (6) right knee; (7) residuals of septectomy; (8) anxiety reaction (a neurosis); and (9) dental.

Plaintiff sent a request to the Army BCMR, on Dec. 17, 1980, asking that the verdict of his Army Courtsmartial be changed to not guilty. On Nov. 4, 1981, Plaintiff received an unfavorable decision from the BCMR, which showed that only Plaintiff's application and some 30 pages of irrelevant military records were considered; and Plaintiff's request for consideration of his military records in his VA file containing four copies of his Courtsmartial record itself, was ignored.

Plaintiff immediately refiled the application asking for reconsideration, because of the above, and 2½ years later, on April 12, 1984; received a vertually identical denial. Plaintiff had previously sent the BCMR a copy of the Courtsmartial record and other evidence, by Certified Mail, which the receipt No. 427014, showed the BCMR received on March 10, 1982, and completely ignored it.

It is most respectfully submitted that it is impossible for the BCMR to properly consider Plaintiff's request, without looking at the available record of the Courtsmartial, and all the other evidence of record cited by Plaintiff.

The BCMR ignored all of Plaintiff's contentions of jurisdictional errors; errors of judgement; prejudiciously selected parts of evidence, to allege plaintiff was 100% fit for Army duty; and ignored all evidence that proved otherwise; including the VA decision that was permanent, and even had the OSG allegedly consider the same evidence, which also overturned the VA decision, after reviewing it.

Since the BCMR upheld the unqualified diagnosis of Col. Hornisher; that contradicts all the Army

psychiatric evidence of record, and reviewed a VA decision that found Plaintiff 100% disabled; and overturned it to find the Plaintiff 100% fit for Army duty; this proves that the Army was previously aware of Plaintiff's diagnosed conditions, and instead of giving the Plaintiff a medical discharge, unjustly convicted him, fined him, and made him stay in service till his tour of duty was up, causing his disabling conditions to worsen.

On April 16, 1984, Plaintiff filed a Tort Claim and when it was ignored, went into Brooklyn Federal Court on Nov. 30, 1984; CV 84-4302, asking for Court review of the BCMR decision, and damages; citing as jurisdiction, Amendment V of the Constitution; CFR Title 32; USC Title 10, and the Freedom and Privacy of Information Acts.

Plaintiff asked for a Certified copy of all evidence used by the BCMR in reaching their adverse decision. What Plaintiff received were uncertified copies, some unreadable, including prejudiciously selected evidence from Plaintiff's VA file, excluding the Courtsmartial record itself, which the BCMR never considered.

The BCMR claimed Plaintiff's missing records, including the available Courtsmartial record, were destroyed in the Records Center fire of July 12, 1973, and again used Plaintiff's seperation date as his discharge date; because records of servicemen discharged on Plaintiff's seperation date were destroyed in said fire; while records of servicemen discharged on Plaintiff's actual date of May 31, 1962, were not. Is it possible that the Army doesn't know their seperation date from their discharge date? In general, the BCMR ignored Plaintiff's contentions; misinterpreted others, and offered completely irrelevant defenses for their case, motioning for dismissal.

On Jan. 25, 1983, Judge Bramwell dismissed the case, based only on the Statute of Limitations, while completely ignoring Plaintiff's answer and contentions therein; and in fact, stated that the Plaintiff had not filed an answer, and when the Plaintiff tried to speak in Court after the Judge's decision, he was not allowed to do so, as shown by the record. The Judge also found that the uncertified, unreadable, and incomplete copies given

to Plaintiff to be complete and certified, and the extent of the BCMR's obligation under FOIA/POIA. No mention was made of Court review of the BCMR and OSG decisions, which reviewed a VA decision.

Plaintiff filed his appeal to the Court of Appeals for the Second Circuit, on Feb. 8, 1985; docket number 85-6036.

Plaintiff pointed out he was requesting a change of record under Article 69, UCMJ, 10 USC 869; and FOIA/POIA, 5 USC 552a(d)(2), and 5 USC 552a(g); Beller v Middendorf, No. 75-2747 GBH N.D. Calif., April 15, 1976 (unpublished); and 4 MLR 6008-9; and was entitled to Court review under both, and the Statute of Limitations cited by the District Court did not apply to same.

Plaintiff also pointed out, that the U.S. had given up their Soverign Immunity by the creation of the VA, whereby, a Veteran can apply for disability compensation for disabling "service-connected" conditions. VA decisions awarding service-connected disability compensation, are binding on the service of record, and are infact, damages levied against said service of record; paid out of the U.S.

Treasury. Although VA decisions awarding said compensation are not reviewable in Court under 38 USC 211; said decisions are not considered permanent and protected for 20 years, from the effective date of said award, and anyone, including said service of record, can petition the VA to change their decision. After 20 years, the VA can no longer change said decision, as it becomes permanent and protected under 38 CFR 3.951, except by a showing of fraud, but not retroactively.

In this instant case, the Army had a very generous 20 years to petition the VA to change its decision; effective date June 9, 1956 to June 9, 1976; but failed to do so, and in effect, accepted the VA decision that found Plaintiff to be 100% disabled by service-connected conditions; and was under a "legal disability" as mentioned by law 28 USC 2401 (a).

The Plaintiff during said 20 years could not sue the Army based on said VA decision, even if his psychosis condition permitted it, because it would be premature, and would deprive the Army of their right to petition the VA to change their

decision. After the decision became permanent on June 9, 1976; Plaintiff, under 28 USC 2401(a) had six years, if not longer, since he was under a legal disability, to bring suit against the Army, but had to exaust all remedies first; so he began by filing a request for a change of the Army Courtsmartial, on December 17, 1980, with the BCMR. More than 3 years later, on April 16, 1984, the BCMR made their final unfavorable decision, not to amend the Courtsmartial, by ignoring a copy of same; reviewing a permanent VA decision, and having the OSG do the same, with both finding said VA decision completely incorrect, and overturning it. Plaintiff then filed his Tort Claim, and about 6 months later, on November 30, 1984, went into Brooklyn Federal Court; CV 84-4302; demanding Court review of the decision, and damages.

Note that at this point in time, there is no defense that the Army can use, since the only defense is that Plaintiff was not 100% disabled from service-connected conditions, while in service, and to try and use this as a defense, would be a de facto review of a protected and permanent VA

decision, made under law 38 USC 211, which is not allowed. Obviously, the Doctrine of Laches, or any similar laws, cannot be used as a defense, as the Army is not hindered by any alleged evidence that is missing, since said evidence cannot be used as a defense in Court.

The BCMR answered (1) again claiming that the evidence not considered was destroyed in the Records Center fire; again using Plaintiff's seperation date as his discharge date; (2) ignored all the Army psychiatric evidence of record that diagnosed Plaintiff as being Psychotic and neurotic, and stated that Plaintiff was only treated for physical problems while in service; (3) claimed that Plaintiff never responded to the BCMR's motion in district Court, when in fact, Plaintiff has a copy of his answer, stamped as being received by the defense and the Court, both of whom, ignored it; (4) alleged that Plaintiff is challanging VA decisions, when in fact, it is the BCMR and OSG so doing, by reviewing the VA decision that found Plaintiff 100% disabled, and finding it incorrect; (5) stated that the Statute of Limitations prevents

Court review of the BCMR and OSG decisions.

All of Plaintiff's actual contentions were ignored, such as the fact that the Army sent his "Honorable Discharge"certificate to him, 22 years after the fact; on Nov. 14,. 1984; and he had no way of knowing if he had been given an honorable discharge, and could not legally sue the Army without one; since an honorable seperation does not in the least mean an honorable discharge; Harmon v Brucker, 355 U.S. 579(1958); Stapp v Resor, 314 F. Supp. 475 (S.D.N.Y. 1970); etc. Note that the Army now claims that Plaintiff was discharged on his seperation date of June 9, 1956; instead of the date of May 31, 1962, found on Plaintiff's Honorable Discharge certificate.

The Court of Appeals, on June 3, 1985, dismissed the case, based only on 28 USC 2401(a), with it being quoted, except for the last sentance, which mentions a person being under legal disability. It is further stated "We have carefully examined the claims of George and Sofia Pappanikolaou, and found them to be without merit." The Court also stated that they had not made a formal opinion, and

stated that it should not be used as a precedent. This seems like an unnecessary restraint on the Plaintiff, for if as it is claimed, no formal opinion was made, then there would be no need or advantage in using said decision as a precedent. In view of the above, the Court of Appeals has ignored a request for an explination of their decision, and Plaintiff's request for reconsideration and the right to use their decision as a precedent, was denied by the Court on July 16, 1985.

REASONS FOR GRANTING THIS WRIT

In this instant case, Plaintiff has an unusually large total disability VA rating of 180%, for Psychosis; 2 incurable chronic Pain Conditions, Tension and Sinusitis Headaches; and bad left knee; plus an additional 10% rating for a Sinus condition; and service-connected conditions of anxiety neurosis; residuals of septectomy; right knee; and a dental condition; all effective Plaintiff's date of seperation from service, June 9, 1956; the earliest possible date.

Because of the above, Plaintiff was found to be 100% disabled as of said seperation date, and was under a legal disability as mentioned by law 28 USC 2401; which the Army BCMR and the Courts refuse to accept as being valid.

Under law 38 USC 211, VA decisions awarding benefits, have a singularly unique protection in that said decisions are considered final and not reviewable in Court, for 20 years. However, during said 20 years, anyone can petition the VA to change said decisions, such as the Army; who failed to do so, and in effect accepted said decision. After 20

years, the decision becomes permanent and protected, under law 38 CFR 3.951, and can no longer be changed by the VA, except by a showing of fraud, and even then, not retroactively.

Both Federal Courts have refused to acknowledge the protection of said VA decisions; and have allowed Court review of said VA decisions by the BCMR and OSG, and have even reviewed said decisions themselves, inorder to make their decision.

The Supreme Court has previously decided that said law 38 USC 211 is Constitutional, and the Supreme Court's power of supervision is once more required to reaffirm their previous decision, and related issues.

1.) With respect to the BCMR and OSG reviewing a VA decision made under law 38 USC 211 and which became permanent under law 38 CFR 3.951. As mentioned above, a VA decision found Plaintiff to be 100% disabled as of his seperation date of June 9, 1956; from service-connected conditions. Service-connected is defined in 38 CFR 3.1(k) "that such disability was incurred or aggrevated in line of duty in the active military service." The BCMR

ignored said VA decision, and concluded Plaintiff was 100% fit for Army duty, as of said seperation date; then asked the OSG to review the facts of the case, which the OSG did, and reached the same conclusion as the BCMR; also ignoring the VA decision.

It is most respectfully submitted that the BCMR and OSG, not only reviewed a VA decision by the above, but found it totally incorrect, and overturned it. It is well known, that in the past, the OSG has refused to review unfavorable VA decisions, when asked to do so, by Veterans. It is clearly unfair for the OSG to only review favorable VA decisions, when asked to do so by the Army, and overturn them, while simultaneously refusing to review unfavorable VA decisions, when requested to by Veterans, in the hope that their opinion might be used by said Veterans as evidence, when an appeal of a regional office decision is made to the Board of Veterans Appeals in Washington, where statistics show that a Veteran has only about a 7½% chance of succeeding with an appeal.

2.) With respect to BCMR and included OSG

decisions, being reviewable in Court, with respect to a request for a change of military record under Article 69 and/or the Privacy Act of 1974. It is most respectfully submitted that a courtsmartial conviction is a federal criminal conviction because courtsmartials are criminal prosecutions brought on behalf of the United States. In 1968, Congress amended the Uniform Code of Military Justice (UCMJ). A procedure was instituted for the first time, by which Veterans with Special Courtsmartial convictions (not resulting in a dishonorable discharge) could appeal these convictions; Article 69, UCMJ, 10 USC 869. There is no time limit on Article 69 appeals, and a conviction by courtsmartial can be reviewed by the Federal Courts; Schlesinger v Councilman, 420 US 738 (1975). The Privacy Act of 1974 can also be used to correct errors in military records; Beller v. Middendorf, No. 75-2747GBH N.D. Calif. April 1976 (unpublished), and 4 MLR 6008-9.

3.) With respect to a Veteran being under "legal disability" by the above mentioned VA decision, that found Plaintiff to be 100% disabled

because he was Psychotic; had 2 incurable chronic pain conditions; etc.; as mentioned by law 28 USC 2401, which the Courts invoked and quoted to dismiss Plaintiff's case, but did not consider or quote the part of said law that refers to "legal disability"; thereby ignoring Plaintiff's contention of same.

It is most respectfully submitted that the Plaintiff was legally found to be 100% disabled by the VA as of his date from seperation from service, June 9, 1956, and that this must be accepted by the Courts, because if it is not, this would mean that the Courts reviewed the permanent VA decision, and overturned it; which is not permitted under laws 38 USC 211 and 38 CFR 3.951.

4.) With respect to the Army now deciding that Plaintiff was discharged on his seperation date of June 9, 1956 found on Plaintiff's form DD-214, and not on the date of May 31, 1962 found on Plaintiff's Honorable Discharge certificate, to claim that Plaintiff's military records, which were not considered in making their decision, such as the available Courtsmartial record itself, were destroyed in the July 12, 1973 Records Center fire;

because records of servicemen discharged on Plaintiff's seperation date were destroyed in said fire; while records of servicemen discharged on Plaintiff's actual discharge date were not; and to invoke the Statute of Limitations sooner; as of Plaintiff's new discharge date, being his actual seperation date.

It is most respectfully submitted that the above is rediculous, and that the Courts should not have allowed the Army to retroactively do so; 28 years after the fact. At the time of the fire, Plaintiff's records were stored with servicemens' records that were discharged on May 31, 1962; and were not destroyed in said fire; and changing the Plaintiff's discharge date now, retroactively, does not mean that said records were destroyed then, in said fire. Also changing a person's discharge date does not change the Statute of Limitations; retroactively.

Obviously, if this is allowed, then the Army would be liable for all of the many ramifications arising from said change; and the Army would have a very effective weapon that could be used in

unprecedented fashion, to deprive Veterans of disability compensation; and invoking the Statute of Limitations at an earlier date; to deprive Veterans of their rights.

5.) With respect to a VA decision made under law 38 USC 211, which is not 20 years old, and has not become permanent under law 38 CFR 3.951. It is most respectfully submitted that a VA decision, which is not permanent, cannot be used in a case against the Army, since it would deprive the Army and/or other interested parties of their right, for a very generous 20 years; to petition the VA to change said decision. What would happen, for example, if a Veteran sued the Army and won a case based on said VA decision, only to find, that later, the VA decided to change said decision; based on a petition by the Army or other interested party, or from a regional office of the VA itself?

6.) With respect to the fact that the Plaintiff didn't receive his honorable discharge certificate, dated May 31, 1962, till November 14, 1984, 22 years after the fact, and which the Army now claims is in error, and that Plaintiff was discharged on his

seperation date of June 9, 1956. An honorable seperation does not in the least mean an honorable discharge; Harmon v. Brucker, 355 U.S. 579 (1958); and Stapp v. Resor, 314 F. Supp. 475 (S.D.N.Y. 1970). If a Veteran couldn't prove he had an honorable discharge, he did not have the right to sue the Army. The only way to prove an honorable discharge is with the honorable discharge certificate. If one didn't have said certificate, then one had no way to prove otherwise, especially since there was always the chance one was given a dishonorable discharge; and if the Supreme Court allows the Army to now retroactively or arbitrarily change a discharge date; then there is no reason not to allow the Army to also retroactively change the type of discharge, as well.

7.) With respect to the Army trying to defend the BCMR decision that found Plaintiff was 100% fit for Army duty as of his date of seperation from service; June 9, 1956. By so doing now, the Army would be in violation of law 38 USC 211, which, as well known, the Supreme Court has previously found to be Constitutional, since there is a permanent VA

decision that found Plaintiff to be 100% disabled from service-connected disabilities, as of the same said seperation date; since a de facto Court review of a permanent VA decision is not allowed, by law 38 USC 211, and 38 CFR 3.951.

U.S. DISTRICT COURT-EASTERN DISTRICT OF NEW YORK

George & Sofia Pappanikolaou, Plaintiffs, pro Se

-against- Secretary of the Army, Defendant

Relevant part ofCourt record; case CV 84-4302, Judge Bramwell; dated January 25, 1985, 10AM.

NOTE: no seperate decision was issued by the Court.

The Plaintiff states that from June 9, 1954 to June 8, 1956 --more than 20 years ago --he served in the U.S. Army Signal Corps. Purportedly, he was released from the Signal Corps to the U.S. Army reserves under honorable conditions for desertion.

The Plaintiff claims that such discharge was improper for various reasons, that many of the documents filed concerning his discharge were not proper,that he has suffered mental anguish and physical suffering as a result of the defendant's failure to properly release him from the Signal Corps, and that his wife has experienced loss of social status due to the Army's actions.

Even if the Court were to assume that Mr. and Mrs. Pappanikolaou's allegations were true, it could not grant the relief sought since the statute of limitations has run on the unsatisfied portion of

their claim. While the plaintiffs assert that the Court has jurisdiction over this claim pursuant to the U.S. Constitution, various federal regulations, and the Freedom of Information Act, their claim is actually for relief in the form of a writ of mandamus under 28 USC Section 1361 and money damages pursuant to theories of negligence and malfeasance.

Regarding the writ of mandamus, the defendant has already produced the documents which are the subject of the writ. On the other hand, the Court has no power to adjudicate the money damages portion of the claim. The plaintiffs' right of action in this matter accrued in the late 1950s; yet they waited more than 20 years to file their complaint or otherwise take steps to set the instant claim in motion. Consequently, the Plaintiff's claim is without a doubt outside the 6 year statute of limitations set forth in 28 USC Section 2401(a).

For the foregoing reasons, the defendant's motion to dismiss pursuant to Rule 12(b) is granted. The Clerk of the Court is instructed to

enter a notice of dismissal in this matter, and I'm signing a notice of dismissal now.

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UNTIED STATES COURT OF APPEALS-SECOND CIRCUIT

At a stated term of the U.S. Court of Appeals for the second circuit, held at the U.S. Courthouse in the City of N.Y., on the 3rd day of June, 1985. PRESENT: HONORABLE IRVING R. KAUFMAN, HONORABLE AMAYA L. KEARSE, Circuit Judges, HONORABLE JACOB MISHLER, District Judge*..* Of the Eastern District of N.Y., sitting by designation.
George & Sofia Pappanikolaou, Plaintiffs-Appellants against SECRETARY OF THE U.S. ARMY, Defendant-Appellee. 85-6036

Appeal from the U.S. District Court for the Eastern District of N.Y.

This cause came to be heard on the transcript of record from the U.S. District Court for the Eastern District of N.Y., and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. Pappanikolaou asserts that the District

judge improperly dismissed his complaint as time-barred. It is well-settled that "every civil action commenced against the U.S. shall be barred unless the complaint is filed within 6 years after the right of action first accrues."28 USC 2401(a)(1982). Pappanikolaou's cause of action for "more than two decades of mental anguish and physical suffering" caused by the Army's negligence and malfeasance accrued in 1956, at which time his court-martial conviction was approved and he was discharged from active duty. See Mathis v. U.S., 391 F.2d 938 (Ct.Cl. 1968) He did not file a complaint until October 1984 -- more than 28 years later. Consequently, the district court properly dismissed Pappanikolaou's action as barred by the six-year statute of limitations.

2. We have carefully examined the other claims of George & Sofia Pappanikolaou, and find them to be without merit.

3. Accordingly, the order of the district court id affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly

available to all perties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court. Signed by:

Irving R. Kaufman, Amaya L. Kearse, Jacob Mishler.

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U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the U.S. Court of Appeals for the Second Circuit, held in the U.S. Courthouse in the City of N.Y. on the 16th day of July, 1985. Present: Hon. Irving R. Kaufman, circuit judge, Hon. Amalya L. Kearse, circuit judge, Hon. Jacob Mishler, District judge. No. 85-6036.

George & Sofia Pappanikolaou Plaintiff-appellant

Secretary of the U.S. Army, Defendant-Appellee.

A petition for a rehearing having been filed herein by Plaintiff-Appellant George & Sofia Pappanikolaou, pro-se, UPON consideration thereof, it is ordered that said petition be and is hereby DENIED. Signed Elaine B. Goldsmith, Clerk.